# Ong Chuan Huat Sdn Bhd v Mohd Jais bin Abdullah

HIGH COURT (PENANG) – CIVIL SUIT NO 23-128-88
WAN ADNAN J
2 NOVEMBER 1988

*Civil Procedure – Mareva injunction obtained by plaintiffs – Application to set aside – Whether plaintiffs had a good arguable case – Whether plaintiffs had shown risk of disposal of defendant's assets – Merits of case*

The plaintiffs claimed against the defendant for a certain sum of money, being the agreed balance due from the defendant for work done and money expended in the construction of a fish farm for the defendant. The plaintiffs applied for and was granted a Mareva injunction by the court. The defendant then applied for the injunction to be set aside.

The plaintiffs' claim was based on the statement of account which, according to the plaintiffs, had been acknowledged by the defendant for work done, materials provided and money expended by the plaintiffs. The plaintiffs had also produced affidavits and invoices stating that work materials had been delivered to the defendant's premises for the construction of the fish ponds. The defendant, on the other hand, denied owing the plaintiffs the amount claimed and stated that he instructed C, the chairman of the plaintiff company, but not the plaintiffs.

**Held**, dismissing the application:

(1) The essential requirements for a Mareva injunction were: (a) the plaintiff must show he had a good arguable case; (b) the plaintiff must produce evidence that the defendant had assets within the jurisdiction; and (c) that there was a risk of the defendant's assets being removed from the jurisdiction or disposed of within the jurisdiction so as to render them unavailable or untraceable to satisfy the judgment the plaintiff was likely to obtain.

(2) Applying the test laid down in *Ninemia Maritime Corporation* v *Trave Schiffahrtsgesellschaft mbH & Co KG*,[2] the plaintiffs had a good arguable case based on the statement of account and affidavits produced.

(3) As to the third requirement for a grant of a Mareva injunction, there was sufficient evidence produced by the plaintiffs to show that there was a risk of the disposal of the defendant's assets out of Malaysia.

[*Editorial Note*: The defendant has appealed against the above decision vide Civil Appeal No 424 of 1988.]

**Cases referred to**

1 *Pacific Centre Sdn Bhd* v *United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 (refd)
2 *Ninemia Maritime Corp* v *Trave Schiffahrtsgesellschaft mbH & Co KG* [1983] 2 Lloyd's Rep 600 (folld)

*R Rajasingam* for the applicant/defendant.
*Abu Haniffa bin Mohamed Abdullah* for the respondents/plaintiffs.

*Cur Adv Vult*

**Wan Adnan J:** In this action the plaintiffs' claim against the defendant is for the sum of $121,692.89 being the agreed balance due from the defendant for work done, materials provided and money expended by the plaintiffs for the defendant in the construction, maintenance and management of a fish farm for the defendant.

By the summons-in-chambers dated 20 June 1988 the plaintiffs applied for a Mareva injunction. The application was heard before me ex parte on 21 June 1988 and I granted the order in terms of the application.

By the summons-in-chambers dated 26 July 1988 the defendant applied for an order to set aside the order granted on 21 June 1988. This application was fixed for hearing on 27 August 1988 but by consent was adjourned to 8 September 1988. After hearing the parties I dismissed the application with costs. The defendant now appeals.

The essential requirements for a Mareva injunction are:

(i) the plaintiff must show he has a good arguable case;
(ii) the plaintiff must produce evidence that the defendant has assets within the jurisdiction;
(iii) there is a risk of the defendant's assets being removed from the jurisdiction or disposed of within the jurisdiction so as to render them unavailable or untraceable to satisfy the judgment the plaintiff is likely to obtain.

I shall first deal with the first ingredient, namely, whether the plaintiffs have a good arguable case.

The plaintiffs' claim is based on the statement of account which according to the plaintiffs had been acknowledged by the defendant and/or his servants or agent. The statement of account had been signed by the defendant, his son and his employees at various times for work done, material provided and money expended by the plaintiffs. The statement of account was produced as exh OCH1 attached to the affidavit of Ong Chuan Huat, the managing director and chairman of the plaintiff company. The statement of account was produced without being accompanied by the translation thereof. There were signatures on the statement and the last figure was $121,692.89 being the amount of the claim.

By his affidavit affirmed on 12 September 1988 Seow Boon Kheang stated that in 1985/86 his company had delivered sand, bricks and red earth to the premises of the defendant at Ladang Pondok Upeh for the construction of fish ponds. Ong Chuan Huat in his supplementary affidavit affirmed on 6 September 1988 produced a few invoices for materials supplied in connection with the work undertaken by him for the defendant.

The defendant in his affidavit affirmed on 22 July 1988 denied owing the plaintiffs the amount claimed. He did not deny the authenticity of the statement of account but said the same related to the various other business transactions he had with Ong Chuan Huat and not with

the plaintiffs. He did not deny having signed the statement of account. He did not deny the construction of the fish ponds but said that he instructed Ong Chuan Huat and not the plaintiffs. The defendant in effect had said that he had dealings with Ong Chuan Huat and not with the plaintiffs, Ong Chuan Huat Sdn Bhd.

Ong Chuan Huat had affirmed that the fish ponds were built by the company. The various invoices were made in the name of the company.

Edgar Joseph Jr J in his judgment in the case of *Pacific Centre Sdn Bhd* v *United Engineers (Malaysia) Bhd*[1] quoted the judgment of Mustill J in the case of *Ninemia Maritime Corp* v *Trave Schiffahrtsgesellschaft mbH & Co KG*:[2]

> In my judgment, he (Lord Justice Kerr) was doing no more than reiterating that the plaintiff must always demonstrate a likelihood of success and was not prescribing the degree of likelihood. In these circumstances I consider that the right course is to adopt the test of a good arguable case in the sense of a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than fifty per cent chance of success.

I agree with the test and applying the test I am satisfied that the plaintiffs have a good arguable case.

I need not deal with the second ingredient since it is not in issue.

For the third ingredient, I agree with Edgar Joseph Jr J when he stated in the *Pacific Centre's* case[1] that the test was to be as follows:

> I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant...

In this case the plaintiffs had produced the affidavits of Loo Kim Yeong and Sim Yam See both affirmed on 18 July 1988. Both had stated that the defendant had said that he intended to sell his properties and to move to Thailand.

The defendant in his affidavit denied that he ever intended to sell his properties and to leave Malaysia. Although he denied the truth of the affidavits the defendant did not consider it necessary to cross-examine the deponents on their affidavits. In my opinion there is sufficient evidence produced by the plaintiffs to show that there is a risk of the disposal of the defendant's assets.

For the above reasons I dismissed the defendant's application with costs.

*Application dismissed.*

Solicitors: *R Rajasingam & Co*; *Syarikat Abu Haniffa*.

Reported by *Ng Sheau Jiuan*

# AMZ Corporation Sdn Bhd v Sye Ah Chai

HIGH COURT (IPOH) – ORIGINATING MOTION NO 32-44-87
ABDUL MALEK J
1 NOVEMBER 1988

*Administrative Law – Order of certiorari against Industrial Court award – Non-disclosure of fact that applicant made reference under s 33A of the Industrial Relations Act 1967 and that Industrial Court consequently handed down award under s 33B when application for leave for order of certiorari was made – Applicant had applied for leave with 'unclean hands' – Motion dismissed – Alleged errors of law committed by Industrial Court – Merits of case – Industrial Relations Act 1967, ss 33A & 33B*

The applicant applied to the court for an order of certiorari to quash an award of the Industrial Court on, inter alia, the following grounds: (a) the Industrial Court erred in law in failing to consider that the respondent and W were from different categories of employees carrying out different though occasionally overlapping work at different offices and in holding that the principle of 'first in last out' applied in respect of these different categories; (b) the Industrial Court had accepted the accounts produced by the respondent despite the fact that the maker was not called whereas for that same reason it had rejected the accounts submitted by the applicant and had therefore erred in law in applying different standards of proof required for the respondent and the applicant company; (c) the Industrial Court had acted in excess of jurisdiction in failing to take into consideration the duty of the respondent to mitigate his loss and by imposing an arbitrary figure of 10% towards mitigation for gainful employment.

In the course of the court hearing, it was disclosed that the applicant had not made known that it had actually made a reference under s 33A of the Act when it applied for leave for the writ of certiorari.

**Held,** dismissing the application:

(1) The award under s 33B was relevant to the issue and by failing to disclose the fact that it had actually made a reference under s 33A and that the Industrial Court had consequently handed down the award under s 33B when the application for leave was heard, the applicant had in fact applied for leave for the writ of certiorari with 'unclean' hands. On this score alone, the motion should be dismissed.

(2) The court can see no error made by the Industrial Court in holding that both W and the respondent were actually from the same category of 'workman' as both were actually clerks and that there was no reason for the more senior clerk of the two, namely, the respondent, to be retrenched first.

(3) As to the second contention, the Industrial Court did not apply different standards of proof as regards the production of accounts by both parties. This matter was not mentioned in the award and the applicant did not amplify on this defect in their affidavits. This ground must therefore also fail.

(4) As to the third ground, there is nothing to suggest that the Industrial Court had acted without or in excess of jurisdiction by awarding the respondent his pay for the full 17-month period from the date of dismissal to the date of award and by deducting 10% in mitigation towards gainful employment. In fact, in their decision, the Industrial Court had stated that this was the standard practice and these two issues were of not sufficient importance even to be referred to the High Court.

(5) Having carefully perused the written decision for the award and the facts of this case, the court was of the opinion